Supreme Court, U.S.
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IN THE
**SUPREME COURT OF THE UNITED STATES**
October, 1994

In Re James E. Carter
&
Shirley L. Carter,
Petitioners,

# PETITION FOR WRIT OF HABEAS CORPUS AND OF MANDAMUS TO THE DISTRICT COURT AT KANSAS CITY, MISSOURI

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## QUESTIONS PRESENTED

1) Does incarceration for contempt (enforcement of an IRS summons), while two unadjudicated motions challenging the jurisdiction of the subject matter are on the minute docket, "conflict with (the) applicable decision of this Court's adjudication"?

2) Is the refusal of the District Court to rule on motions challenging jurisdiction of the subject matter, after repeated motions for the court to make/address such rulings, "a departure from the accepted and usual course of (due process) as to call for an exercise of this Court's power of supervision"?

3) If the sole defense presented for five years is that the government's complaint, as routinely filed by the IRS for summons enforcement, does not fulfill constitutional standards of due process, and the courts have refused to adjudicate the question even when presented in a motion challenging jurisdiction of the subject matter, is the issue "an important question of federal law which has not been, but should be, settled by this Court"?

4) If the response to 3) is negative, does such action by the courts in denying a constitutional right to due process — by silence — constitute participation in a violation of 18 USC 241/242?

(Above quotations from Supreme Court Rule 10, "Considerations governing review".)

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## ACTIONS BELOW

The Order of the District Court holding James Carter in civil contempt is at page A-14. The court has not ruled on the action in habeas corpus nor on the motion for a hearing mailed to the court by certified mail on June 13. The Order changing the docket (same June 13 mailing) is at page A-15.

The Order of the Eighth Circuit Court of Appeals denying writs of mandamus and habeas corpus is at page A-13.

## JURISDICTION

Jurisdiction for habeas corpus is found at 28 USC 2241. Jurisdiction for mandamus is at 28 USC 1651(a). Procedural guidelines for seeking two petitions in one application is at Rule 20.3(a). While habeas corpus and mandamus are infrequently sought as a pair, it is submitted the unique, exceptional, interconnected circumstances will justify combining the two actions for judicial efficiency.

## CONSTITUTIONAL PROVISIONS

The Fifth Amendment reads in part: "nor shall life, liberty, or property be taken without due process".

## STATEMENT OF THE CASE

Early events have previously been presented to this court and are a matter of record. (Reference Petition for Certiorari and for Rehearing, 93-303)

On April 22, 1994, the United States of America filed a motion for the attachment of the two bodies of petitioners for contempt of court. (Ref. 89-149 and 89-150, WMKC.)

On May 2, the Carters filed two written motions challenging the jurisdiction of the subject matter. These motions are attached as appendix A-1 and A-10.

On May 26, the U.S. Marshal served a writ of attachment (dated May 20) on James Carter and took him to District Court and began an immediate hearing. At hearing, Carter "moved" the court to rule on the two motions challenging jurisdiction; denied; Carter "moved" the court to hold a hearing on the two motions; denied; the court found Carter in contempt and he is now in the Marshal's custody.

On May 27, Shirley Carter presented herself to the court, was denied the opportunity to talk with her co-defendant, was denied severance from James Carter, was found in contempt, and was in the Marshal's custody until August 10, 1994.

On May 31, a letter was mailed to the Clerk of the District Court requesting a transcript of the two hearings. On June 8, another request for transcript with motion to correct docket entries was mailed. On June 13, certified mail was sent for 1) transcripts 2) motion to correct docket 3) Motion for hearing on motions before the court 4) Petition in Habeas Corpus. On June 16, an audio recording of the two hearings was requested. On June 30, a letter from the court reporter declared no tape recordings were available and the transcripts would cost approximately $120.00.

An Order from the District Court that changed the docket was received July 20. Ref. A-15. The Order retains one "req" motions be heard rather than showing defendant twice "move(d)" the court for rulings. The court overlooks: 1) the motion for a hearing on defendant's two motions filed May 2, and 2) the petition for habeas corpus which were included in the certified mailing to the court on June 13.

On May 31, actions in Habeas Corpus and in Mandamus were mailed to the Court of Appeals. On June 13, notice was received the two actions were filed June 8. (Ref. 94-8066 WMKC) On July 1, an order dated June 28 was received indicating the two petitions were denied without any indication of issuance, an answer, or a hearing. (Ref. A-13)

On July 29, James Carter was transferred to the Metropolitan Correctional Center at Chicago.

On August 3, Shirley Carter was transferred to Alderson, West Virginia. Her severance and release was obtained by professional assistance on August 10.

## REASONS FOR GRANTING WRITS

The incompatability of the government's petition filed in the District Court on June 5, 1989, with due process requirements was brought to this court in 1993 for certiorari (93-303) and received a deaf ear. At no time has any court suggested the government's complaint fulfills due process requirements. Due process requirements have been encapsulated in a motion challenging jurisdiction (page A-1) that the District Court declines to rule upon. Jurisdiction of the subject matter may be challenged at any time. Federal Rule of Civil Procedure 12(b)(2).

Should the Carters have pursued an appeal rather than an action in habeas corpus? (Ref. Sunal v Large, 332 US 174). Such a practice was not recognizable from the meager legal resources available during earlier incarceration. Even if it were, it is submitted that such an effort would have been clearly futile from an examination of the record. Constitutional standards of due process have been overlooked in appeal procedures through the lower courts for five years; there is no reason to suspect a change. Indeed, the results of habeas corpus efforts confirm the pessimistic conclusion.

The challenge to jurisdition is on solid constitutional law; the District Court could not fault the legal conclusion and reacted with incarceration to avoid ruling against the IRS—in defiance of this Court's holding in Reisman v Caplin, 375 US 440, that adjudication is not to be interrupted by incarceration. The court

used power of incarceration to intimidate the Carters into producing the sought records in exchange for freedom—which would moot the legal questions. Habeas corpus will lie to challenge improper incarceration for contempt; if the act does not constitute a contempt, the court was without jurisdiction to imprison and the prisoner is entitled to be released. Ex parte Hudgings, 249 US 378; 39 Am Jur2d Habeas Corpus ##96, 97; Ex parte Terry, 128 US 289.

If habeas corpus is not granted by this court, the claim of a constitutional right by two motions (to due process) has been converted into an act for which incarceration is a suitable punishment. When a claim of a constitutional right becomes a penal offense, the obvious loss of a (very fundamental) constitutional right becomes too apparent to require elaboration. Does this court condone incarceration for the exercise of a constitutional right?

It is an accepted principle that courts have a duty/responsibility to rule on questions of law. 61A Am Jur2d Pleading #71. The District Court denied two oral motions to bring the two written motions challenging jurisdiction before the court to thwart any appeal. According to the established procedure, appellate courts review only specific rulings of a lower court. An action in mandamus was filed in the Court of Appeals to compel a ruling, along with the action in habeas corpus.

If mandamus is not granted, "(t)he primary function of the court to make decisions with regard to matters properly brought

before them" (20 Am Jur2d, Courts #67), has been denied to the Carters. Chief Justice Marshall, in his first landmark case, eloquently established the principle that the courts have a duty, a responsibility, to rule on questions of law. Marbury v Madison, 5 US 137. Mandamus is the means to compel an inferior court to perform its duty. Bankers Life v Holland, 346 US 379. Even a court's instruction in a jury trial is that the court's function is to make decisions on law. The incompatability of the cliche, "We are a government of law, not a government of men." (citations unavailable) with the instant case is believed to be readily apparent.

As tragic as the potential denial of the above historic rights of citizens secured long before our constitution was ever penned, the underlying question of law that the District Court is attempting to prevent from being adjudicated is even more pervasive: Is the government's complaint, filed five years ago, legally adequate to invoke the jurisdiction of the District Court? Neither the court, nor the prosecution, has made any attempt to challenge the merits of the two motions challenging jurisdiction filed on May 2, 1994. For five years, the legal adequacy of the government's complaint has been challenged on due process grounds. Only collateral defenses, which have been repeatedly shown to be inadequate (see page A-1), have been made. The District Court has clearly usurped judicial power and thereby justifies this court's issuance of the writ. Kerr v US District Court, 426 US 394; Iowa Beef Processors v Bagley, 601 F2d 949.

Can this court properly remand to the lower court? Such an action would inherently imply that the district court has, or should exercise, jurisdiction--- and a challenge to the jurisdiction is the precise question that has resulted in incarceration of the Carters, and which the district court has repeatedly declined to adjudicate. The Court of Appeals has additionally declined to compel the district court to make a ruling (page A-13).

Appellate jurisdiction is acknowleged by the Carters, but if it appears the government's complaint does not satisfy the standards of due process (as briefed on appeal in the Eighth Circuit in 1992, ref 92-2511) —and jurisdiction has never been vested in the district court---it would appear that this court should grant certiorari to address the merits of the motions challenging jurisdiction. It is not unprecedented that an action in mandamus is accepted by this court in the form of certiorari. Carter v Court of Appeals, 409 US 1122.

The real question now before this court is whether the people still have a Constitution (and case law) that is still enforced by the courts in protection of the people; whether the collector of revenue is still hampered by such archaic due process provisions as averring a statute that authorizes a tax; the statutory conditions that make an individual legally subject to that tax; what facts will be evidenced at hearing to prove subjection; and required to submit these averments to contestation or, on the other hand, is unbridled power, without

any pretext of lawful authorization, the standard operating procedure of tax enforcement agencies? Without the above elements, "taxation" is nothing short of extortion under color of law. Is the insistence upon receiving the above Constitutional rights sufficient cause for incarceration? From my jail cell the view is quite pessimistic.

If the above due process provisions are not required in pleadings, the only thing remaining is power (as evidenced by the power of a summons in the instant case). The exercise of unmitigated power, inevitably increased with time, is limited only by the tolerance of the people. As more people pass the point of toleration (as evidenced by press releases by the IRS that increasing numbers are not filing tax forms), and if the civilized resolution of disputes in a judicial forum is unavailable, the only alternatives available are either servile slavery or a call to arms (Ref. Declaration of Independence). Our proximity to this ultimate choice-in-action depends on the eye of the beholder. 220 years ago, the eye of King George misread the situation, and that period did not involve a tax burden of 35-50% of the GNP.

The only substantive defense presented by the Carters for five years is the legal inadequacy of the complaint/petition with due process. The manner of the District Court --- of refusing a ruling on a question of Constitutional law --- is representative of the evasive actions. Can Constitional rights be so blithely evaded without recognizing the profound destruction of our very social fabric? This Court recently held, in quite forceful

language, that the IRS is subject to the same legal status and requirements of any other federal agency. Church of Scientology v US, 121 LEd2d 313; 506 US --- (1992). A country preserved at the sacrifice of all the cardinal principles of liberty is not worth the cost of preservation. (Ex Parte Milligan, 4 Wall 2).

Perhaps it might be suggested some procedural quirk was not observed. Do fundamental rights hang by some tenuous thread of procedure that their unavailability --- perhaps by silence --- does not constitute a violation of 18 USC 241/242? If this were so, the procedure for their assertion can be made so convoluted that even the best masters of law cannot solve the maze. "A reviewing court will look to principles to guide judicial discretion...rather than to formal rules rigorously controlling judicial action." 52 Am Jur2d Mandamus #494; citing Roche v Evaporated Milk Assn., 319 US 21. Rules of procedure are written to achieve justice, not to avoid it.

Our Judicial system, as the sworn ultimate protectors of Constitutional rights, must be held to a higher standard than any other entity. "[T]o declare that a government may commit crimes in order to secure the convictions of a private (citizen) [or to expedite tax collection] - would bring terrible retribution. Against that pernicous doctrine this Court should resolutely set its face." Olmstead v. US, 277 US 438. Dis. op. by J. Brandeis.

This court has succinctly observed the compelled production of an individual's private books papers without showing a legitimate purpose "affects the very essence of Constitutional liberty and security." Boyd v. US, 116 US 616, 630. "A person's interest in maintaining the privacy of his 'papers and effects' is of sufficient importance to merit constitutional protection." Church of Scientology v US, 121 LEd2d 313, 320; 506 US —(1992), inner quote from Fourth Amendment. Are sanctimonous platitudes in Upjohn v. US, 449 US 383, US v. Euge, 444 US 707, and every Justice's Oath of Office that this court will protect and preserve Constitutional rights mere hollow promises?

Pro se's documents are to be construed liberally. Haines v Kerner, 404 US 519.

If the Constitution is no longer enforceable against the IRS, then surely we should eliminate the more obvious hypocrisies: Remove the blindfold from the Lady of Justice and allow her to put her thumb on the side of the Scale for the IRS; remove the pious clichés from courthouse edifices that extol justice, public service, and protection of the people; and for God's sake remove that hideous French monstrosity from Ellis Island and ship it and its wretched plaque back home.

## RELIEF SOUGHT

It is respectfully submitted, based upon the foregoing, that the following relief is in order:

1. That this Court issue a writ of habeas corpus to the Honorable Dean Whipple to show cause why James Carter should not be immediately released.

2. That this Court issue a writ of mandamus to the Honorable Dean Whipple to issue findings of fact and conclusions of law on the Carter's two motions that challenge jurisdiction of the subject matter.

3. If this Court concludes that jurisdiction of the subject matter may have never been vested in the district court, then this Court should grant certiorari and adjudicate the constitutional inadequacy of the government's complaint.

4. If this Court finds the complaint insufficient to vest jurisdiction of the subject matter, an Order should be granted that federal identification numbers, arrest records, and all documentation of incarceration of the Carters shall be expunged one year after the date of such findings.

5. Such other relief as provided by law or equity.

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## AFFIDAVIT

This petition has been written in confinement by James Carter with the resources available. It has been typed, formatted, reproduced, and served with outside family assistance. An affidavit by James Carter was included with the first printing submitted to this Court. All statements of fact contained herein of which I have first hand knowledge are true and accurate. All other facts are as I believe them to be.

Shirley Carter

Shirley Carter (07792-045)
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Harrisonville, Mo. 64701

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NOTARY PUBLIC

Affirmed and declared before me, a notary public, this 30 day of September, 1994.

Naomi J. Miller

My comission expires 5/5/95.

# APPENDIX

**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION**

(United States of America v Shirley L. and James Carter, civil actions No. 89-W-149 and 89-W-150 filed May 2, 1994)

**MOTION TO SET ASIDE THE MANDATE FOR LACK OF JURISDICTION OF THE SUBJECT MATTER FOR THE COMPLAINT'S/PETITION'S 1) NON-CONFORMANCE WITH REQUIREMENTS OF 'APPROPRIATE PROCESS' and for 2) INCOMPATABILITY WITH DUE PROCESS STANDARDS**

The defendants do hereby move this court to set aside the mandate of the court of appeals and to dismiss the complaint/petition for lack of jurisdiction of the subject matter for the petition's non-compliance with "appropriate process" requirements and for incompatability with due process standards. "Appropriate process" cannot be compatible with process that denies numerous basic constitutional rights protected by "due process."

**POINTS AND AUTHORITY IN SUPPORT OF MOTION TO SET ASIDE MANDATE**

Questions of jurisdiction of the subject matter may be raised at any time, even by habeus corpus; there can be no estoppel to object on this ground. Gainesville v Brown-Crummer Investment Co, 277 US 54.

There are two prerequisites that must be satisfied to invoke jurisdiction: 1) the Constitution must have given the courts the capacity to receive it, and 2) an act of Congress

must have conferred it. Marbury v Madison, 5 US 137. This Motion raises no issue of whether constitutional authorization for jurisdiction of a tax has been shown; the question is whether the petition has complied with the requirements of "appropriate process" and for due process.

Jurisdiction is conferred by congress upon the district courts by 26 USC ##7402(b) and 7604(a) for the enforcement of an IRS summons which declare the court "shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data." The question becomes : " What constitutes 'appropriate process' ?"

Let us make the point "squarely and inescapably." It is irrational that "appropriate process" can be compatible with a complaint (entitled "petition") that flagrantly violates numerous fundamental due process requirements protected by the constitution. A system of justice is impossible with irrational logic, but the court has spoken directly to the issue.

The enforcement of a revenue summons "is not (to be) in derogation of any constitutional right." US v Euge, 444 US 707, 711, 718; Upjohn v US, 449 US 383, 398; nor can congress deny "applicable constitutional guarantees." Euge at 712. More emphatically, the denial of a constitutional right would involve a violation of 18 USC 241 and 242 and expose the judicial system to criminal acts.

A mere form, identified as a petition or a complaint, is insufficient. It is substance to which the court must look. Mullane v Central Hanover Bank, 339 US 306: McNutt v Turner, 83 US 352. Rules of pleading are made for the

attainment of substantial justice. Wiggins Ferry Co. v Ohio & M. Ry Co., 142 US 396. The relevant substance required by due process for a pleading is two-pronged: averments of law and averments of facts.

## AVERMENTS OF LAW

Due process requires a legal duty of the defendant to the plaintiff must be alleged, and a breach of that duty by the defendant. Alabama v Burr, 115 US 413; Giaccio v Pennsylvania, 382 US 399. **FACT:** The petition contains no averment of any statute that the defendants have any legal duty (nor a breach of that duty) to the plaintiff.

The plaintiff's allegations must, if proved as laid, be such as to show as a matter of law, the essential elements of a cause of action in his favor. 61A Am Jur2d, Pleading #71. If issues are not alleged, the court cannot act upon them for they are not put into contestation. Hill v Mendenhall, 88 US 453, 455. **FACT:** There is no place in the petition that an income tax is identified, yet the court concluded an income tax was being enforced.

The terminology of tax cases has become a requirement to show a legitimate/ authorized purpose. US v LaSalle National Bank, 437 US 298; US v Powell, 379 US 48. This authorized purpose has often been (as in the above cited cases) to verify the accuracy of tax forms, signed under threat of perjury, whereby the signer has accepted the legal responsibility of a tax. Bothke v Fluor Engineering, 713 F2d 1405. The instant case does not involve any such pre-acceptance of a legal responsibility by the defendants; the

burden of showing a legal responsibility is squarely on the movant.

The authorized purpose for the IRS is to "collect the taxes imposed by the internal revenue laws" (26 USC 6301) and the petition does not identify any of 80 potential taxes being pursued. The petition makes a nebulous statement about "determine tax liability." Process which does not notify parties of the issues and put them into contestation is not due process. Dohony v Rogers, 281 US 362; Anderson National Bank v Luckett, 321 US 233.

The plaintiff contends statutory authorization of a summons to demand books and records may suffice. The summons is a power—it is not a purpose. The courts have consistently declared that due process deals with the exercise of power which must be restricted to authorized purposes. Kinsella v US, 361 US 234; Snyder v Massachusetts, 291 US 97.

The distinction between power and authorized purpose was addressed by Lord Camden in the historic challenge to general warrents: "Such is the power [claimed by the Secretary of State for general warrents] and therefore one would naturally expect that the law to warrant [authorize] it should be clear in proportion as the power is exorbitant. If it [authority/purpose] is law, it will be found in our books; if it is not to be found there, it is not law." Entick v Carrington, 19 Howell, St. Tr., 1029 (1765), from extensive quotations in Boyd v US, 116 US 616, at 627. "The principles laid down in this opinion [regarding compelled production of an individual's private papers without showing a legitimate purpose] affect the very essence of

constitutional liberty and security." Id, 630; ref. Brock v North Carolina, 344 US 424.

The Supreme Court has stated IRS summons are to be enforced for the performance of congressionally imposed responsibilities absent substantial countervailing policies. US v Euge, 444 US 707. However, no congressionally imposed responsibility has been identified in the instant petition. Additionally, this court's desire to not deny due process to the defendants and to thereby avoid violating 18 USC 242 is a substantial countervailing policy.

The plaintiff appears to contend an affidavit pursuant to US v Powell, 379 US 48, is sufficient. An affidavit of law is an oxymoron.

## AVERMENTS OF FACTS

Due process requires every material fact essential to the existence of the plaintiff's cause of action, and which he must prove to sustain his right of recovery, must be averred. US v Merriam, 263 US 179. Averments of facts are not to be deduced or inferred from pleadings and much less to rely on assumptions from attached exhibits. Garrett v Louisville NR Co., 235 US 308; 61A Am Jur2d Pleading, #32. Due process requires that only evidence to prove averments is to be received by the court. Berger v US, 295 US 78; 32 Am Jur2d Federal Practice #386. **FACT:** There is no averment indicating that any fact, ultimate or evidentiary, is to be proven.

The security of the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice, is the primary

purpose of due process. Malloy v Hogan, 378 US 1. Due process is the very essence of a scheme of ordered justice. Twining v New Jersey, 211 US 78; 16A Am Jur2d Constitutional Law, #816. **CONCLUSION:** When an individual can be dragged before a tribunal and never be confronted with a legal accusation that he must pay a tax, or be told what event has occurred which imposes the tax, but the tribunal finds him responsible, then the arbitrary actions of the Inquisition have paled in comparison.

The plaintiff relies heavily upon US v Powell, 379 US 48, and following cases, to claim attached affidavits fulfill/nullify due process requirements. The case is off-point. The Powell court accepted an affidavit of suspected fraud to enforce a summons without verifying evidence. The issues in this case are completely different. The instant case involves a determination if an individual may be legally responsible for a tax, while that status of taxpayer was determined in Powell before process was served by Powell's filed tax forms. To be succient, the Powell case involved an individual self-certified to be a taxpayer and averred to have violated that legal responsibility without any confirming facts (the affidavit was substituted for facts); the instant case involves evidenced "facts" (that were not averred) for an unidentified tax, without any averred legal responsibility—not even that of being a taxpayer. ref. 26 USC #7701(a)(14). The plaintiff appears to suggest Powell's affidavit would eliminate the necessity to aver any and all law and facts—which would obliterate 780 years' civilization of society. ref. l6A Am Jur2d Constitutional Law

#805. There is no evidence the Powell court implied such judicial revolution.

The plaintiff additionally relies upon attached exhibits (form # 6638) to claim averments are not required. No supportative authority that government forms replace pleadings has been offered.

This court cannot rely upon the mandate of the Court of Appeals (ref. 988 F2d 68) to deny this motion. The mandate relies upon two statutes and a definition to deny the defendants' relief. The issues raised in this motion regard constitutional protections/ requirements of due process. The Brief on Appeal contains additional Supreme Court citations on due process; at no place has the Court of Appeals addressed constitutional issues. It is well established that constitutional rights do not yield to mere statutes. US v Euge, 444 US 707, 712.

## THE STATUTORY REQUIREMENT OF "APPROPIATE PROCESS" CANNOT BE A LOWER STANDARD THAN CONSTITUTIONAL REQUIREMENTS

Even without the statutory requirement of "appropriate process", there must be "a suit instituted according to the regular course of judicial procedure" before jurisdiction attaches. Muskrat v US, 219 US 346, 356; US v Choate, 276 F2d 724. Non-compliance with due process requirements to properly inform the accused of the offense fails to vest jurisdiction. Smith v US, 360 US 1, 10. "We believe that a judgment...reached without due process of law is without jurisdiction and void, and attackable...by resistance to its enforcement...because the United States is forbidden by the

fundamental law to take either life, liberty or property without due process of law, and its courts are included in this prohibition." Bass v Hoagland, 172 F2d 205, 209; VTA, Inc. v Airco, 597 F2d 220, 225. Proceedings in a court are legally void where there is an absence of jurisdiction over the subject matter. Re Bonner, 151 US 242; Scott v McNeal, 154 US 34.

Given the obvious that the petition does not comply with basic fundamental requirements of due process (this premise has been presented for five years in every document filed by the respondents, and has never been directly challenged by the plaintiff nor denied by any court), there are two possibilities: 1) Jurisdiction was vested and a constitutional right was denied in criminal violation of 18 USC 242, 241, or 2) Jurisdiction was not vested and the proceeding has been a nullity. If the first possibility is assumed, for the discussion, a criminal act terminates any government action (Davis v Passman, 442 US 228) and events become mere actions by individuals. Butz v Economu, 438 US 478; Bivens v Six Narcs, 403 US 388.

**SUMMARY**

It is readily apparent that the above constitutionally secured due process standards for pleading require the government to 1) identify the legal authority for the tax being pursued and 2) identify why (by law/facts) the defendant is required to pay the tax and 3) submit these claims to contestation. There can be no more fundamental requirements of a pleading to enforce a tax than these---yet they have never been shown. Without these elements, "taxation" becomes nothing short of arbitrary extortion under

color of law; which was condemned by Boyd v US, 116 US 616, 624. To maintain that the statutorily required "appropriate process" would include pleadings that deny constitutional rights would cause the judicial system to be in conflict with criminal provisions of 18 USC 241 and 242, and would also be inconsistent with Supreme court adjudication that requires compliance with due process before jurisdiction is vested.

## RELIEF SOUGHT

The mandate of the court of appeals must therefore be set aside/vacated for the complaint's/petition's incompatability with requirements of "appropiate process" and also with due process requirements to vest jurisdiction of the subject matter; the petition must be dismissed; and relief appropriate under 26 USC #7430 must be granted.

**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION**

{United States of America v Shirley L. and James Carter, civil actions 89-W-149 and 89-W-150 filed May 2, 1994}

**MOTION TO SET ASIDE THE MANDATE OF THE COURT OF APPEALS FOR LACK OF JURISDICTION OF THE SUBJECT MATTER PER THE STANDARDS OF THE SUPREME COURT**

The defendants hereby move this court to set aside the mandate of the court of appeals and dismiss the complaint/petition for lack of jurisdiction of the subject matter for non-compliance with the requirements established by the Supreme Court of the United States for an act of Congress providing for internal revenue.

**POINTS AND AUTHORITY IN SUPPORT OF MOTION TO SET ASIDE THE MANDATE OF THE COURT OF APPEALS FOR LACK OF JURISDICTION OF THE SUBJECT MATTER PER THE STANDARDS OF THE SUPREME COURT**

Questions of jurisdiction of the subject matter may be raised at any time, even by habeus corpus; there can be no estoppel to object on this ground. Gainesville v Brown-Crummer Investment Co, 277 US 54.

Jurisdiction of a court over the subject matter is something that must be affirmatively pleaded in the complaint (FRCvP 8(a); KVOS, Inc. v Associated Press, 299 US 269) and subsequent oral or written reference to claimed sources of

jurisdiction do not suffice. McNutt v GMAC, 298 US 178. It is not sufficient that jurisdiction may be inferred, argumentatively, from other averments. Hull v Burr, 234 US 712.

There are two prerequisites for jurisdiction that must be present: first, the Constitution must have given the courts the capacity to receive it, and second, an act of Congress must have conferred it. Marbury v Madison, 5 US 137. This Motion raises no issue of whether congress has conferred jurisdiction; the question is where has the movant shown the constitutional authority required for this court to assume jurisdiction.

The Supreme Court has spoken directly to this point as it relates to taxation: "This clearly implies that the term 'revenue law,' when used in connection with the jurisdiction of the Courts of the United States, means a law imposing duties on imports or tonnage, or a law providing in terms for revenue; that is to say, a law which is directly traceable to the power granted to Congress by Section 8, Article 1, of the Constitution, "to lay and collect taxes, duties, imposts, and excises.'" US v Hill, 123 US 681, 686; People v Bruce, 129 F2d 424. ref. 20 Fed. Proc. LEd, Internal Revenue # 48:1288. The lack of inherent authority within the IRS has been observed by the court. US v LaSalle National Bank, 437 US 298, 316.

The instant petition does not identify the constitutional authorization for exercise of the revenue tax that applies in this case. In fact, a revenue tax is not identified in the petition. The petitioners have asserted a revenue power (a summons) in the petition but there is no authorized purpose/legitimate tax identified. The court has clearly declared that power is to be

exercised only for authorized purposes. Kinsella v. US, 361 US 234.

In US v LaSalle National Bank, supra, and US v Powell, 379 US 48. the court identified the authorized purpose of verifying the accuracy of tax forms self-certified under threat of purjury; the submitted tax forms constitute an acknowledgment of the signer's legal responsibility for the relevant tax. Bothke v Fluor Engineering, 713 F2d 1405. The instant petition makes a vague declaration of "investigation into the tax liability" of the defendants; no authorized purpose is averred.

It is apparent that not one, not two, but three links, that must be shown by the internal revenue agency for this court to acquire jurisdiction of the subject matter have not been identified in the instant petition: 1) the constitutional authority for a tax has not been shown, 2) no authorized purpose/tax has been identified, 3) no act has been identified, by law or fact, that makes the defendant responsible for that tax. Proc eedings in a court are legally void where there is an absence of jurisdiction over the subject matter. Re Bonner, 151 US 242.

**SUMMARY AND RELIEF SOUGHT**

The Supreme court has declared enforcement of revenue laws require the plaintiff to directly trace the authority for their taxing authority to the constitution to invoke the jurisdiction of the court. The plaintiff has miserably failed this requirement. The mandate of the court of appeals must therefore be set aside for lack of jurisdiction of the subject matter; the petition must be dismissed; and the defendants must be granted relief in accordance with 26 USC #7430.

**United States Court of Appeals**
for the Eighth Circuit

No. 94-8066

In re: Shirley L. Carter;
James E. Carter — Petition for Writ of Mandamus

Petitioners.

Filed: June 28, 1994

ORDER

The court has considered the petitions for writ of habeas corpus filed June 8, 1994 and June 14, 1994, and the petition for writ of mandamus. The petitions are denied.

**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION**

UNITED STATES OF AMERICA,
and GARY JONES, Revenue
Officer of the Internal Revenue Service,

Petitioners,

v. No. 89-W-149-1

JAMES E. CARTER,

Respondent

**ORDER**

The Court held a civil contempt hearing on May 26, 1994. At this hearing, the Court determined that Respondent had failed to comply with the Court's February 10, 1992 Order to provide the Internal Revenue Service with certain financial documents. These financial documents had been requested by the IRS in a summons received by Respondent on June 5, 1989 by certified mail. Accordingly, it is

ORDERED that Respondent is in civil contempt of this Court. He shall be incarcerated until these financial documents are delivered to the IRS.

Signed by Dean Whipple, US Judge.

Date: June 1 or 7, 1994

**IN THE UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF MISSOURI**
**WESTERN DIVISION**

{United States of America v James Carter, civil action 89-W-150(sic)}

**ORDER**

Pending before the Court is the motion of defendant to add and correct docket entries on this Court's docket. The first such request deals with a motion filed by the government "between 8/24/93 and 5/2/94." In checking the Court's docket, it appears that the government's motion of April 22, 1994, for a writ of attachment was not docketed by the Court's docket clerks. The second request by defendant deals with the minute docket entry for 5/26/94 which reads "Hrg on return of writ of Attachment; parties appear and ready for hrg; dft req his mts to be heard; denied; dft moved the court to hold a hearing on dft's written motions before the court; denied; the court ... James Carter ..." Defendant requests the word "held" be inserted in the space indicated above, after "court" and before "James Carter." Upon consideration, it is

ORDERED that both defendant's requests be granted, and the Clerk of the Court is instructed to add a docket entry, dated April 22, 1994, and describing the motion for writ of attachment filed by the plaintiff on that date (doc. #38); and it is further

ORDERED that, with regard to the Court's 5/26/94 minute entry, the word "held" be inserted after "court" and before "James Carter," as indicated above.

Signed: Dean Whipple, US Judge. Dated July 13, 1994

**SELECTED DOCKET ENTRIES---- June 6, 89-149**

5/2/94 38 MOTION by respondent in 4:89-mc-00149 for order to set aside the Mandate of the Court of Appeals for lack of jurisdiction of the subject matter per the Standards of the Supremen Court (89-W-150) (dh) [Entry date 05/03/94] [4:89mc149]

5/2/94 39 MOTION by respondent in 4:89-mc-00149 for order to Set Aside the Mandate for Lack of Jurisdiction of the Subject Matter for the complaint's/petition's 1) non-conformance w/requirements of appropriate process' & for 2) incompatability w/due process standards (89-W-150) (dh) [Entry date 05/03/94] [4:89mc149]

5/20/94 41 ORDER by Judge Dean Whipple for Writ of Attachment.....

5/26/94 42 MINUTE ENTRY: Hrg on return of writ of Attachment; parties appear and ready for hrg; dft req his mts to be heard; denied; the Court James Carter in contempt of court until he supplies the information to the IRS or 18 months whichever comes first. (kmc) [Entry date 05/27/94] [4:89mc149]

(2)

Supreme Court, U.S.
FILED
NOV 18 1994
OFFICE OF THE CLERK

No. 94-634

# In the Supreme Court of the United States

OCTOBER TERM, 1994

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IN RE SHIRLEY L. CARTER AND JAMES E. CARTER,
PETITIONERS

---

*ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MISSOURI*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether petitioners are entitled to a writ of mandamus compelling the district court to rule on their motions to set aside the mandate of the court of appeals that affirmed the district court's order enforcing two Internal Revenue Service summonses.

# In the Supreme Court of the United States

OCTOBER TERM, 1994

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No. 94-634

IN RE SHIRLEY L. CARTER AND JAMES E. CARTER,
PETITIONERS

---

*ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MISSOURI*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The order of the court of appeals (Pet. App. A13) is unreported. The order of the district court (Pet. App. A14) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on June 28, 1994. The petition for a writ of mandamus and for a writ of habeas corpus was filed in this Court on August 8, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1651(a).

### STATEMENT

1. In January 1989, in furtherance of an investigation into petitioners' income tax liabilities, the Internal Revenue Service delivered "Income Tax Return" summonses to each of petitioners. *United States* v.

*Carter*, 988 F.2d 68, 69 (8th Cir. 1993). The summonses indicated that the Internal Revenue Service was investigating the income tax liabilities of petitioners for the years 1983 through 1987, "for which year(s) no return(s) ha[d] been made," and requested information necessary for the Internal Revenue Service to prepare federal income tax returns for those years. *Ibid.* When petitioners failed to comply with these summonses, the United States commenced this enforcement action. *Ibid.*

After a hearing, the magistrate issued a report and recommendation concluding that (i) the tax investigation was being conducted for a legitimate purpose; (ii) the information sought was relevant to that investigation; (iii) the information was not already within the government's possession; and (iv) the administrative steps required under the Internal Revenue Code had been followed. 988 F.2d at 69. See *United States* v. *Powell*, 379 U.S. 48 (1964). The magistrate recommended that petitioners be ordered to comply with the summonses. 988 F.2d at 69.

The district court adopted the magistrate's report and recommendation and entered an order directing petitioners to comply with the summonses. 988 F.2d at 69. The court of appeals affirmed and also imposed sanctions of $1,500 against petitioners for having prosecuted a frivolous appeal. *Ibid.* Petitioners filed a petition for a writ of certiorari from the judgment of the court of appeals, which this Court denied. 114 S. Ct. 197 (1993).

2. On May 2, 1994, petitioners filed motions in the district court to set aside the mandate of the court of appeals (Pet. App. A1-A9, A10-A12). In these motions, petitioners renewed the same arguments they had advanced in the summons enforcement proceedings (Pet. App. A8, A10).

On May 20, 1994, the district court issued an order directing petitioners to be brought before the court to answer for their failure to comply with the summonses (Pet. App. A16). The court held a contempt hearing for petitioner James E. Carter on May 26, 1994, and for petitioner Shirley L. Carter on May 27, 1994 (Pet. 2; Pet. App. A16). At his hearing, Mr. Carter made an oral motion for the court to rule on his motions to set aside the mandate of the court of appeals, which the district court denied (Pet. App. A16). On June 1, 1994, the court issued orders finding petitioners in civil contempt and ordered them to be incarcerated until they produced the documents requested in the summonses (*id.* at A14).

Petitioners then returned to the court of appeals, where they filed petitions for a writ of habeas corpus and a petition for a writ of mandamus directing the district court to rule on the motions to set aside the mandate of the court of appeals (Pet. 3, 6; Pet. App. A13). On June 28, 1994, the court of appeals denied petitioners' motions (Pet. App. A13).

3. On August 10, 1994, following compliance with the summons issued to petitioner Shirley L. Carter, the district court issued an order directing her release from incarceration. See Pet. 2. Petitioner James E. Carter has not yet complied with the summons issued to him. He remains in custody under the order entered by the district court on June 1, 1994. See *ibid.*

## ARGUMENT

Petitioners seek a writ of mandamus directing the district court to rule on motions to set aside the mandate of the court of appeals (Pet. 12).[1] Petitioners, however,

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[1] Petitioners also request the Court to issue a writ of habeas corpus (Pet. 12). Pursuant to Rule 20.4(b) of the Rules of this

have not shown (i) that the district court has persistently and without reason refused to rule on the motions to set aside the mandate of the court of appeals and (ii) that no other adequate means was available to them to obtain the requested relief. The petition for a writ of mandamus should therefore be denied. See *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 35 (1980); *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655, 661-662 (1978). See also *Chandler* v. *Judicial Council of the Tenth Circuit*, 398 U.S. 74, 86 (1970).

Petitioners' motions to set aside the mandate of the court of appeals simply renew the same arguments they had advanced earlier. The court of appeals found those arguments to be frivolous when first raised and imposed sanctions against petitioners. 988 F.2d at 69. The decision of the court of appeals on those issues is obviously conclusive for the district court; only the court of appeals could grant the relief that petitioners sought. *Fine* v. *Bellefonte Underwriters Ins. Co.*, 758 F.2d 50, 52 (2d Cir. 1985), cert. denied, 474 U.S. 826 (1985); *Seese* v. *Volkswagenwerk, A.G.*, 679 F.2d 336, 337 n.1 (3d Cir. 1982); *Barrow* v. *Falck*, 11 F.3d 729, 731 (7th Cir. 1993). The available remedy of a petition for rehearing to the court of appeals was an adequate means for petitioners to renew their contentions.[2]

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Court, we address only petitioners' request for a writ of mandamus.

[2] Petitioner James E. Carter has the additional available remedy of challenging his incarceration by filing a motion for relief under 28 U.S.C. 2255. That statute authorizes the same relief available through a writ of habeas corpus (*United States* v. *Hayman*, 342 U.S. 205, 216-217 (1952)) and therefore provides an adequate means by which a person incarcerated for civil contempt may contest the propriety of his incarceration. *United States* v. *Hallahan*, 768 F.2d 754, 755 (6th Cir. 1985), cert. denied, 475 U.S.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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*Solicitor General*

LORETTA C. ARGRETT
*Assistant Attorney General*

CHARLES E. BROOKHART
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*Attorneys*

NOVEMBER 1994

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1021 (1986); *Chatman-Bey* v. *Thornburgh*, 864 F.2d 804, 806 n.2 (D.C. Cir. 1988). Although petitioners assert (Pet. 3) that they mailed a petition for a writ of habeas corpus to the district court on June 13, 1994, the court's docket entries do not reflect such an entry.

Reply Brief Unavailable at Time of Filming